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Supreme Court of the United States

October Term, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 90 national and international unions with a total membership of approximately 14 million working men and women, with the consent of the parties as provided for in this Court's Rules.

INTRODUCTION AND SUMMARY OF ARGUMENT

Without exception, so far as we are aware, labor relations statutes in this country permit employees in an appropriate collective bargaining unit to choose—by a majority vote in a democratic election—a labor organization as their exclusive representative for that unit that provides collective-bargaining-related services to more than one bargaining unit, and that sets its dues in a way that requires the employees in all the represented units to pay a pro rata share annually of all of the union's chargeable expenses *or* a labor organization confined to the employees' own unit.

Petitioners maintain, *inter alia*, that objecting fee-payers have a constitutional right to opt out of a multi-bargaining unit economic system for providing collective-bargaining-related services chosen by the unit as a whole, and to insist, instead, upon paying an agency fee that only covers such collective-bargaining related services as are directly rendered to the particular bargaining unit in which the fee payers work within a particular year.[1]

[1] In this case, the Ferris Faculty Association-MEA-NEA is a local labor organization affiliated with a state and a national organization, each of which provides collective-bargaining-related services to a large number of bargaining units.

In other instances, a local labor organization may itself represent two, or many, bargaining units. Or a national labor organization may itself be the bargaining representative, and may either operate as a unitary national organization or be split into local

Petitioners are wrong; the Constitution no more enacts their "direct costing by bargaining unit" theory (Brief for Petitioners, 21) than Mr. Herbert Spencer's Social Statics. We proceed to demonstrate as much by first considering the economics of this matter and by then turning to the First Amendment precedents.[2]

I. As the result of thousands of representation-election determinations by millions of employees, multiunit labor organizations that set their dues and fees on a cost-sharing basis have come to be the predominant type of American trade union.[3] Such organizations provide employees in each unit with access to greater resources, at lower cost, and with more assurance of availability when needed. A wide variety of labor organizations in both the public and private sectors have chosen some variant of the multiunit

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organizations for certain administrative purposes. *See* pp. 16-19, *infra*.

We do not believe, however, that the difference between a unit that has chosen as its representative a local union affiliated with a national union and a unit that has chosen a representative organized on another of these multiunit lines is significant for present purposes. In all these instances, the majority of employees has chosen an organization that is capable of generating larger resources, of producing economies of scale and of risk-sharing across bargaining units, and presumably has made the choice in part because of those capabilities.

[2] As to the remaining issues raised by appellants, the AFL-CIO concurs in the submissions of the respondent unions and the other *amici curiae* supporting respondents so as not to burden the Court with redundant argument.

[3] This case arises in the public employment context. However, the general models of union organization, and the economic principles and valuing considerations underlying those models are in large part the same whether the covered employees work in the public or private sector. Nor, to the extent that constitutional considerations apply at all to private sector employees (*see Communications Workers v. Beck*, 487 U.S. 735, 761-762 (1988); *compare Railway Employes' Dept. v. Hanson*, 351 U.S. 225 (1956)), do those considerations vary fundamentally depending upon the public or private context. *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977). Consequently, in this brief, we draw upon examples from both the public and private sectors.

cost-sharing model, adapting the model to the particular circumstances of the industry in which the union operates. Thus, the multiunit method of providing and financing collective-bargaining-related services is one "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984).

Where a group of employees chooses a multiunit approach to providing and funding collective-bargaining-related services, objecting fee payers as well as union members share in the distinct added economic benefits of that approach: The efficiencies of integrating the pro-benefits provided by insurance principles.

These economic benefits are *not* taken into account in petitioners' "direct costing" approach. In contrast, Michigan in establishing its public employee labor relations system *has* taken these economic benefits into account. Michigan has done so by permitting employees to elect representation by unions organized and financed in whole or in part on a multi-unit/cost-sharing basis, and to require fee payers as well as union members to be charged for collective-bargaining-related services not on a fee-for-direct-services-rendered-to the unit basis, but on a uniform, flat fee basis. Michigan's judgment in this regard is that such a system advances the interest in industrial peace and does so in a way that prevents free riding. Pp. 4 to 19, *infra*.

II. This Court's precedents made it plain that the Constitution permits "the legislative enactment of 'agency shop' laws . . . to prevent 'free riders'—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the cost of a process from which they benefit." *Keller v. State Bar of California*, —— U.S. ——, 110 S.Ct. 2228, 2235 (1990). Having held the "agency shop" constitutional as a general matter, this Court's decisions further teach that the question to

be answered in passing on the constitutionality of one form of agency shop or another is "whether the[] expenses [at issue] involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest." *Ellis v. Railway Clerks*, *supra*, 466 U.S. at 456. And in making this assessment, the Court has expressly recognized that "[t]he very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled funds." *Id.* at 456. All this being so, Michigan's conclusion that the agency fee should be based on a multiunit union's total collective-bargaining-related expenditures is plainly constitutional. Pp. 20 to 30, *infra*.

ARGUMENT

I. MULTIUNIT FINANCING OF COLLECTIVE-BARGAINING-RELATED SERVICES IS A METHOD COMMONLY USED BY LABOR ORGANIZATIONS, AND ONE WITH A DISTINCT ADDED ECONOMIC VALUE NOT FAIRLY REFLECTED IN THE DOLLAR COST OF THE DIRECT SERVICES PROVIDED TO A PARTICULAR BARGAINING UNIT IN A PARTICULAR TIME PERIOD.

We begin our examination of petitioners' contention that the *Constitution* requires that all union expenses for collective-bargaining-related activities be calculated on a bargaining-unit-by-bargaining-unit basis for agency fee purposes by considering some basic economic principles that have application not only in the agency fee context but in many other analagous areas.

Petitioners recognize, as they must, that objecting fee payers in a particular collective bargaining unit can constitutionally be required to pay for such collective-bargaining-related services as are directly provided to that unit by the union chosen to be the exclusive bargaining representative by a majority vote of the unit em-

ployees. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

The bargaining representative in this instance is a local union affiliated with large multiunit state and national unions, the Michigan Education Association ("MEA") and the National Education Association ("NEA"). By the terms of the affiliation, MEA and NEA provide certain collective-bargaining-related services to represented employees through the local union.

In common with most state and national unions, MEA's and NEA's basic income is derived from per capita fees paid by the employees represented by all their affiliated local unions. MEA and NEA aggregate those fees for the purpose of making collective-bargaining-related services available to all their local affiliates. Indeed, the ability to amalgamate resources in this way for this purpose has been one of the primary forces propelling the growth of national, as opposed to local, labor organizations from the mid-nineteenth century on.[4]

Petitioners contend that it is unconstitutional to rely on this traditional method of sharing the costs of collective-bargaining-related activities among all employees represented by a multiunit union in calculating the agency fee charged to objecting employees. According to petitioners the Constitution requires "direct costing by bargaining unit." Brief for Petitioners (Pet. Br.) 21. Under the "direct costing" method, an objector's fee would "only include costs which an exclusive representative, and its affiliates, incur in performing its statutory duties as bargaining agent for the dissenters' unit in dealing with their employer on labor-management issues." Pet. Br. 19. And petitioners would have it that the traditional method of financing collective-bargaining-related activities

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[4] *See, e.g.*, R. Dulles & M. Dubofsky, *Labor in America: A History* 84-85, 94-95, 143-145 (4th ed. 1984); L. Ulman, *The Rise of the National Trade Unions* 176-89 (1963); Windmuller, *Concentration Trends in Union Structure*, 35 Ind. & Lab. Rel. Rev. 43, 44-45 (1981).

"charg[es] the nonmembers for those activities on behalf of persons not employed in their bargaining units. . . ." *Id.* at 18-19. Indeed, petitioners base their constitutional objection to the traditional method entirely on this perception: "Coerced subsidization of even non-unit bargaining adds substantially to th[e] interference [with First Amendment rights], because the labor relations of *other persons* 'are matters of public concern,' speech and association concerning which are fully protected by the first amendment." *Id.* at 20 (emphasis in original).

Petitioners fundamentally misstate the situation by asserting that the method of providing and funding collective-bargaining-related services at issue here charges one group of employees for "the labor relations of *other persons*." The proposition that groups of employees would regularly choose a form of union representation that systematically charges them for someone else's collective bargaining is intuitively unlikely. Not surprisingly, that is not at all what occurs.

In the balance of this section we show that by choosing to "operate on a cost-sharing basis" (Pet. App. 56a), employees obtain for themselves two kinds of economic benefits that the petitioners' "direct costing" theory wholly fails to take into account. The first are the efficiencies achieved by assembling and maintaining an expert staff ready and able to serve any represented bargaining unit as need requires. A fee that "only include[s] costs . . . incur[red] . . . in dealing with [the objector's] employer" (Pet. Br. 19), does not take into account the benefits and costs of maintaining the union's collective bargaining apparatus. Second, the availability of the union's total multiunit resources for use in representing a particular bargaining unit has a present economic value—similar to that of insurance coverage—even when the unit is not presently drawing on those resources. Again, the petitioners' "direct costing" theory factors out any "premium" for this coverage.

In short, we show that by operating on the traditional "cost-sharing basis" (Pet. App. 56a), MEA and NEA are not compelling petitioners to pay for "the labor relations of *other persons*" (Pet. Br. 20 (emphasis in original)), but rather are providing each represented bargaining unit, including the petitioners' unit, with two distinct, economically valuable benefits that are fairly taken account of by charging each fee payer a pro rata share of the unions' total collective-bargaining-related costs and that are simply ignored by petitioners' "direct costing" theory.[5]

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[5] Since petitioners' fundamental submission is that objecting fee payers can insist upon contributing only to those collective-bargaining-related expenses actually incurred in the "bargaining unit" in which the fee payer works in a given year, the concept of the "unit" for collective bargaining purposes bears some examination.

As a general matter, the "unit" is simply the group of employees for whom negotiations are conducted, and who are covered by the resulting collective bargaining agreement. The size and scope of the "unit" is, under most labor relations statutes, determined according to a combination of flexible factors; consequently, there can be a number of different possible "appropriate" units for a given group of employees. *See Morand Bros. Beverage Co.*, 91 NLRB 409, 418 (1950).

Thus, under the National Labor Relations Act, a "unit" for collective bargaining purposes can be a subgroup of employees in a particular plant of a particular employer, all the employees of that plant, a craft or departmental group on a multiplant, single employer basis, a craft group on a multiemployer, regional basis, or a regional or nationwide single employer group, including all employees of that employer or a subgroup organized either by department or by craft. *See generally* R. Gorman, *Labor Law*, 66-92 (1976). The precise choice is governed in part by the National Labor Relations Board's standards for different industries, and in part by the choice of the employees and, to some extent, the employers involved. Gorman, *supra*, 68-74.

The same variety obtains in the public sector. For example, while the particular unit in this case covers only a single campus of Michigan's public higher education system, in other instances all the campuses of a higher education institution statewide have been determined to comprise a single unit. *See Minnesota State*

A. *Economies Achieved Through Aggregation of Resources*: By aggregating fees from many bargaining units, MEA and NEA, like other state and national unions, are able to assemble and maintain a specialized and experienced staff that the typical local union could not afford to assemble on its own.

For example, while the average bargaining unit of community college employees would not have the wherewithal to support an in-house economic analysis staff—familiar with the economics of public education generally and public higher education particularly, as well as with the applicable laws and current collective bargaining situation—MEA and NEA can and do maintain such staffs. As a result, the employees in any MEA-NEA bargaining unit have available to them, *at no extra cost*, the services of that staff should a need for economic analysis occur. In addition, unit employees benefit from research conducted by such analysts on a state or nationwide basis, research that no individual unit could afford to finance.

State and national unions, in other words, are the primary means for providing the "lawyers, expert negotiators, economists, and research staff, as well as general administrative personnel" necessary to effectively represent employees working for sophisticated employers functioning in a complex national or international economy. *Abood v. Detroit Board of Education*, *supra*, 431 U.S. at 221. For it has proved beyond the financial capacity of the employees in most bargaining units and in most local unions to develop and maintain such expert staffs.

Board for Community Colleges v. Knight, 465 U.S. 271, 276 n.2 (1984) (all community colleges in Minnesota, by statute, comprise a single bargaining unit).

What this variety means, for present purposes, is that the number, identity and diversity of interests of employees who are in a given unit, and who, even under petitioners' theory, would be obliged to share equally in the costs of providing collective-bargaining-related services is, from a constitutional point of view and the point of view of an individual objecting fee payer, in large part a fortuity.

See D. Bok & J. Dunlop, *Labor & the American Community*, 153-54 (1970).

Moreover, even if an individual bargaining unit had the resources to do so, the unit ordinarily has no *need* for a *permanent* professional collective bargaining staff, for example, since collective bargaining agreements typically last for several years. *See, e.g., General Cable Corp.* 139 NLRB 1123, 1127 (1962) (under the NLRA, three-year collective bargaining agreements are the norm.) Similarly, while a unit may upon occasion become involved in a major lawsuit regarding the interpretation of its collective bargaining agreement, such litigation is relatively rare, and would not justify the hiring of a full-time staff attorney.

If such expert personnel could not be continuously employed on a statewide or nationwide basis—shifting their attention from bargaining unit to bargaining unit as issues requiring their attention arise—then the only—and highly disadvantageous—option would be to retain consultants on an as-needed basis. That option entails substantial costs.

First, it is improbable that consultants with the necessary training and experience would be available on a contract basis when needed. Second, the transaction costs involved in locating and retaining the best available consultants would be considerable. Third, engaging consultants in this manner is likely to be more expensive than employing staff experts because continuous employment offers a measure of financial security in exchange for lower hourly recompense. Finally, and perhaps most importantly, the intermittent use of outside consultants almost certainly will not be as effective, for the consultants will not have the opportunity to develop expertise on the particular problems that face the particular employees.

The special advantages of efficiency and effectiveness derived from aggregating union resources and making staff experts available at no additional cost on an as-

needed basis are recognized in an extensive economic literature on the reasons business organizations—faced with similar practical problems of operating in a complex environment—choose the similar solution of vertical integration into the firm.

In essence the economic learning is that it is more efficient to employ staff members than to contract for their services where the services required are "highly specific to the transaction, there is a high degree of uncertainty involved and, to justify the costs of setting up a system of internal organization, the transaction recurs frequently." S. Davis, "Vertical Integration," in R. Clarke & T. McGuinness, eds., *The Economics of the Firm*, 87 (1987) (Clarke & McGuinness). *See* O. Williamson, *Markets and Hierarchies*, 20-31 (1975).

There are, most importantly, significant savings in transaction costs if the organization is not repeatedly required to locate experts and negotiate for their services. *See* Sawyer, *The Economics of Industries and Firms*, 201 (1985) ("These [transaction] costs would include the time and financial costs of discovering a supply, finding out the price and the nature of the goods or services which the seller has to offer, and the difficulties of ensuring that the goods or services are of the type and quality required.").

As the economic literature also points out, another factor making vertical integration more efficient than employing outside consultants as needed is that staff experts, by working repeatedly on a recurrent set of problems arising in a particular industry or employment context (in this case, public education), gain knowledge that substantially lowers the cost, and increases the quality, of their work over time.[6] If the expert is work-

[6] That is why, for example, clients seek lawyers who specialize in a very specific area of practice, such as wills and estates or admiralty.

ing for an organization, that knowledge becomes an *organizational* asset for as long as the expert is employed. If, however, the expert provides services only as an independent contractor, the knowledge remains the *expert's asset*, that can be used to his or her advantage in renegotiating the consulting contract. *See* McGuinness, "Markets and Managerial Hierarchies," in Clarke & McGuinness, *supra*, 46-47.

Thus, in labor organizations as in businesses, so long as a "transaction recurs frequently" and is "highly specific" to a particular situation (Davis, "Vertical Integration," in Clarke & McGuinness, *supra*, at 87), providing services from within the organization is likely to be more efficient and effective than seeking out independent contractors on an intermittent basis. And, as we have emphasized, the required condition of frequency is not likely to prevail on a local bargaining unit basis, but will prevail only if costs can be aggregated over a sufficient number of local units.

B. *Assurance of Adequate Resources to Meet Extraordinary Demands*: A distinct but closely-related advantage of providing certain collective-bargaining-related services on a statewide, nationwide, or other multiunit basis is that the union is able to provide employees in each unit with an assurance that an extraordinary cost incurred in that unit in any given year will be covered. The applicable principle is the one upon which any insurance system operates: Such a system assumes that while each unit faces a *risk* of catastrophic costs in a given time period, only a small percentage of the units will actually incur such a cost. Each unit is nonetheless willing to pay a pro rata share of the probable catastrophic cost to the group as a whole (a "premium"), so that if the event insured against occurs in the unit, the unit's financial exposure will be limited to the amount of the premium.[7]

[7] Somewhat similarly, businesses often pool the risk of business failure through conglomerate mergers. By linking together the

Risk-sharing is as economically rational in the collective bargaining context as elsewhere: In buying insurance, an economic unit is purchasing the assurance that the unit will be able to meet unusually high costs, should such costs eventuate. That assurance obviates the need to place a substantial share of present income in a holding account in order to protect against the risk; allows rational economic planning; and induces third persons with whom the insured deals to proceed on the understanding that the costs will be covered if incurred.[8]

The essence of the matter is this: Carrying insurance has *present* economic value even if the risk insured against never occurs. That is why individuals who buy term life insurance have not thrown away their money if, as usually occurs, they do not die during the period of coverage.

By a parity of reasoning, by choosing to be represented by a national union that funds its collective-bargaining-related activities on an aggregate national

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economic fortunes of companies in diverse lines of endeavor, a corporation is able to reduce the risk that catastrophic losses of one company in a given year will force that company into bankruptcy:

> If we assume that in any given year (or run of years) there exists for each individual firm some positive probability of suffering losses large enough to induce financial failure, it can be readily shown that the joint probability of such an event is reduced by a conglomerate merger. Clearly, the possibility that the critical level of losses will occur simultaneously for each of the component companies making up the merger is less (and often very much less) than the individual probabilities. [Levy & Sarnat, *Diversification, Portfolio Analysis and the Uneasy Case for Conglomerate Mergers*, 25 The Journal of Finance 795, 801 (1970).]

See also, e.g., Lewellen, *A Pure Financial Rationale for the Conglomerate Merger*, 26 The Journal of Finance 521 (1971); Higgins & Schall, *Corporate Bankruptcy and Conglomerate Merger*, 30 The Journal of Finance 93 (1975).

[8] For example, many states *require* that each driver carry liability insurance, in order to protect those whom a driver may injure against the driver's financial insolvency.

basis, a bargaining unit assures itself, at a reasonable periodic cost, against the possibility that in a given year (for example, a year in which the unit is negotiating a new collective bargaining agreement), its costs will be so large that the unit could not, as a practical matter, raise the necessary funds by itself.

That assurance has value not only in years in which very large costs are incurred, but at *all times*, and even if the costs are never incurred: For one thing, the unit employees need not cut back on such services as grievance and arbitration assistance to individual employees in order to save for years in which unit-wide costs are likely to be extremely high, such as those in which agreements are negotiated. For a second, the assurance that the unit can call on such resources has the added economic value that any third party dealing with the unit—most importantly, in this instance, the employer—will be on notice that the resources are available, and will take account of that fact in his own economic behavior.[9]

C. *Analogous Economic Models*: As the foregoing suggests, and contrary to petitioners' proclamation that "[i]n the free market no one who provides services would be in business long if he charged all customers the same average fee for different services" (Pet. Br. 24), the general method of providing and funding services used by multiunit state and national unions is in no way unique in our economy. Rather, many other organizations provide and price specialized services on an average

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[9] Strike funds, prevalent in private sector national unions, are an excellent example, although far from the only one, of this risk-sharing phenomena: Strike benefits obviously cannot be drawn from the employees in the bargaining unit that is currently on strike. Strikes *must*, therefore, be financed either by the accumulation of funds by a single unit for use in the future or, much more prevalently, by the accumulation of funds on a multiunit basis. Ulman, *The Rise of the National Union*, *supra*, 176. In either case, given the turnover of employees within an individual unit, the employees funding the strike are, in the short run, different from the employees directly benefitting from those funds.

cost, or risk-sharing, basis in preference to a fee-for-direct-services-rendered basis.

Service contracts for computers and copiers, prepaid legal services plans, homeowners' warranty programs covering electrical, plumbing, heating, and similar systems, and extended warranties on automobiles are only a few of the situations in which consumers pay a flat fee for the right to call upon expert services in the future should the need arise, and in which the economic value of that promise cannot be measured by *retrospectively* tracing the actual use made of that available service by a certain consumer in a certain year.

Health maintenance organizations ("HMOs"), because of their internal complexity and the extent to which the organization provides both an "insurance" benefit and an "aggregation of resources-efficiency benefit," provide a particularly close analogy. These organizations "provide[] a wide range of health care services to a defined, enrolled population for a predetermined, prepaid premium . . . . unrelated to the actual number of services utilized by an enrollee in a particular time period." S. Rep. No. 93-129 on the Health Maintenance Act of 1973, 93 Cong., 1st Sess., 2 (1973).

By so doing, the HMO provides this range of health services at a per-unit cost "as much as one-fourth to one-third lower than traditional care in some parts of this country." *Id.*[10] In addition, the HMO approach allows for a more rational integration of the services provided; permits extensive services to be provided in areas that

[10] The reasons why individual medical personnel may charge more than the cost to the HMO of providing the same health service have nothing to do with overreaching. Doctors and other medical personnel operating in small units, like consultants hired intermittently by single-unit unions, are likely to incur larger per capita overhead costs, including rent, support personnel, equipment, and so on. In addition, personnel employed by an HMO, like personnel employed by a national union, have a security of employment not available to those providing service on a fee basis; their salary will tend to reflect this increased security.

cannot support a broad range of medical care as traditionally structured; and provides the assurance that even catastrophic costs will be covered if incurred. *Id.*

While it continues to be true that many individuals nonetheless prefer to obtain medical services on a fee-for-service basis, millions of people have made the perfectly rational economic decision to procure their health services through advance, *pro rata* funding of a delivery system by many individuals.[11] Indeed, national health policy explicitly supports and encourages the availability of this means of procuring and funding health services, Health Maintenance Act of 1973, 42 U.S.C. § 300e *et seq.*

Thus, the wide variety of situations in which consumers are offered, and choose, prepaid access to expert services rather than fee-for-service access to those services, support the conclusion that charging objecting fee payers as well as union members for a pro rata share of a multi-unit union's collective-bargaining-related activities is a method for financing such activities "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984). As *Ellis* teaches, while Congress and the

[11] Even the individuals who do not join HMOs, of course, purchase health insurance when possible to cover the cost of those services. Thus, the choice between an HMO and traditional fee-for-service health care is really a choice between *delivery systems*, and *not* one between per unit-costing and cost sharing over many units. The situation is further complicated by the fact that in many places of employment, participation in a group health plan is mandatory rather than permissive. (The reason for this mandatory requirement is that if lower risk individuals cannot opt out, group insurance can be provided at a lower per capita cost than individual insurance.)

In other words, the health care system in this country is funded for the most part through the very cost-sharing principles that appellants claim are unconstitutional in this instance. We have chosen the HMO example in the text only because it is an even closer analogy to national unions than an ordinary health insurance scheme in that, through group action, HMO's provide economic advantages *in addition to* insurance against risk.

state legislatures are under no constitutional compulsion to accept the "normal" method of financing union representation, where the legislature chooses to do so to further the governmental interest in industrial peace, the Consititution is not an impediment to that decision. *Id.* at 455-456.

D. *"Normal" Union Practices*: We briefly consider the ways in which three specific unions provide and fund collective bargaining services to represented units. The three examples we discuss confirm that, while the range of possible relationships between bargaining units and levels of union organization is as wide as the range of job markets and employment settings in which people work, each variation "reasonably" reflects the structure of the particular industry in which the union operates, and each "normally" provides for a mixture of single unit and multiunit provision and funding of collective-bargaining-related services. This range of possibilities is reflected in the factual settings of this Court's most recent objecting fee payer decisions.

(i) The most recent of these decisions, *Communications Workers v. Beck*, 487 U.S. 735 (1938), arose out of bargaining units at the American Telephone and Telegraph Company ("AT&T") and the former AT&T subsidiary Chesapeake and Potomac Telephone Company of Maryland ("C & P Telephone"). The exclusive representative in *Beck* was the Communications Workers of America ("CWA"), a national labor organization.

CWA itself represents over 700 bargaining units of widely varying sizes in the communications industry alone; signs the applicable collective bargaining agreements; and has overall responsibility for administering those agreements through its central and regional staffs, including complete responsibility for handling grievances at the highest steps of the contractual procedures.[12]

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[12] With respect to the employers involved in *Beck*, there are several national AT&T bargaining units, each covering a different aspect of AT&T's operations, such as sales, manufacturing, installation, and research. The various national collective bargaining agreements between CWA and AT&T have common terms, and all are negotiated at once in a two-tiered discussion: The highest officers of CWA and the highest labor relations officials of AT&T engage in national bargaining to set the general economic terms of the agreements while, simultaneously, other representatives for the union and the employer hammer out the actual terms of the unit by unit collective bargaining agreements.

C&P Telephone is comprised of four different companies—one for each of the States of Maryland, Virginia and West Virginia and the District of Columbia. The agreement covering these four employers is negotiated in joint discussions between the CWA and the four C&P Telephone companies.

In addition, there are over a thousand local unions affiliated with the CWA. Those locals typically aid CWA in fulfilling its collective-bargaining-related activities by participating in the formulation of bargaining demands and in enforcing agreements at the lower levels of the grievance procedure. Many CWA locals represent employees in more than one bargaining unit.

The structure of the CWA and of the bargaining units CWA represents reflect the organization of the telephone industry: The telephone companies providing local service are generally organized along state lines, and given the highly integrated nature of their operations, employees have been generally required to organize on a company-wide basis to secure NLRB certification. *See, e.g., New England Telephone & Telegraph Co.*, 90 NLRB 639 (1950). And, of course, AT&T until quite recently held a virtual national monopoly in the industry.

(ii) The situation of the Chicago Teachers Union ("CTU"), the defendant in *Teachers Union v. Hudson*, 475 U.S. 292 (1986), is at the opposite extreme from that of the CWA: The CTU represents a single bargaining unit in the Chicago city school system. Within that unit are various groupings of professional, para-professional and non-professional employees, each of which could have formed a separate bargaining unit under Ill. Rev. Stat. Ch. 48, ¶ 1707, § 7.

The CTU, however, meets certain of its collective bargaining-related responsibilities by drawing on its affiliates, the Illinois Federation of Teachers ("IFT") and the American Federation of Teachers ("AFT"). The IFT has some 140 local affiliates, and the AFT has over 2,000 local affiliates, some of which represent more than one bargaining unit.

As with the CWA, the CTU's structure reflects the nature of the employer with which the union bargains: The Chicago school system is a large employer centered in one location. Against that background, it makes sense for a local organization to have relatively more direct bargaining responsibility than the state or national organizations. However, just as is the case with the respondent Ferris Faculty Association, the employees who chose the CTU found it desirable to be represented by a local union that could draw on the resources of affiliated state-wide and nation-wide unions.

(iii) Our final example is the Transportation-Communications International Union ("TCIU"), formerly the Brotherhood of Railway and Airline Clerks ("BRAC"), the defendant in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984). The Railway Labor Act, which governs the industries in which TCIU most commonly operates, mandates single employer-wide craft or class bargaining units. 45 U.S.C. § 152, Ninth. Thus, the bargaining unit out of which *Ellis* arose encompassed the entire passenger service craft at Western Airlines.

The TCIU (then BRAC) was the recognized representative of this system-wide unit, and chartered System Board No. 451 as an intermediate body whose primary responsibility was serving the Western Airlines unit. That International also chartered a number of locals to represent Western Airlines employees at various work sites. Operating generally in this manner, the TCIU, either alone or jointly with its various system boards, is the representative of some 750 large and small craft-oriented bargaining units.

Again, it is the nature of the industry that determined the economic and structural relationship between the bargaining unit configuration and the structure of the union representing each unit: The nature of the railroad and airline industries, as reflected in the RLA itself, requires centralized collective bargaining. The employees at Western Airlines initially decided that this role could be best filled by a labor organization that represented employees in many such system-wide units, and chose the TCIU to perform that function (and later determined that a single unit Western Airlines union would be preferable).

Despite their wide variety and complexity, all three of these national unions have been organized on a multilevel basis, and all three provide collective-bargaining-related services in part through a multiunit system financed by pro rata payments from union members and fee payers.[13] Thus, these examples confirm that providing some or all collective-bargaining-related services through a multiunit union able to provide each unit with access to greater and more diverse resources, at a lower cost and with assurance of availability at times of crisis, is a method for providing those services "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." *Ellis v. Railway Clerks, supra*, 466 U.S. at 448.[14]

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[13] At the same time, these examples indicate that funding such services on a single unit basis no less than a multiunit basis can be said to result in an objecting fee payer being required to finance services for individuals whose economic interests may diverge from his own: The CWA units encompass diverse geographical areas, and sometimes more than one employer; the CTU unit is geographically limited, but occupationally diverse, including both professionals and non-professionals; and the TCIU units are occupationally limited but geographically dispersed.

[14] So that we are not misunderstood, we note that, since petitioners do not take issue with the proposition that collective-bargaining-related activities are chargeable to objecting fee payers, *in theory* the "direct costing" advocated by the petitioners should only affect

II. REQUIRING OBJECTING FEE PAYERS TO PAY THEIR PRO RATA SHARE OF A UNION'S MULTIUNIT SYSTEM FOR FUNDING COLLECTIVE-BARGAINING-RELATED EXPENDITURES IS CONSTITUTIONAL

We now return to petitioners' legal contention in this case: that objecting fee payers have a constitutional right to opt out of fair and equal participation in the multiunit/cost-sharing system for providing collective bargaining-related services chosen by the majority of the unit in which the fee payers work, and to fund those services instead as if the services were provided on a single unit, fee-for-direct-services-rendered basis. We show that permitting objecting fee payers to choose for themselves a fundamentally different method of funding collective-bargaining-related services than that selected by the majority of employees in the unit would produce precisely the economic free-riding the agency fee system is designed to prevent and would do so without serving any First Amendment values whatever.

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the way collective bargaining costs are divided among objecting fee payers, both over time and from unit to unit. *See* Pet. Br. 23 n.17 (suggesting that statutes could be amended to allow agency fees to exceed dues).

Assuming that the following conditions are satisfied, "direct costing" in other words, should only shift the share of the chargeable amount from some groups of objectors to other groups of objectors: *If* the objectors' share of collective-bargaining-related costs could be calculated in such a way as to assign to objectors as a group their share not only of the marginal cost of their representation but their share of the cost of assembling and maintaining the group resources available to their bargaining units on call, *if* the costs of calculating the agency fee on this basis were not prohibitive, and *if* employees could not opportunistically change status depending on whether the fee charged objectors was greater or less than normal dues, *then* it would be a matter of indifference to the other employees whether the objecting employees financed their share of collective-bargaining-related costs on a "direct-costing" or a multiunit "cost-sharing" basis.

Because not one of these three conditions prevails in the real world, the actual result of "direct costing" is, however, to permit objectors to free ride.

1. As we have seen (pp. 8-13, *supra*), the multiunit cost-sharing method of providing services generates substantial economic benefits in addition to the provision of a discrete service at a discrete time. Where this method obtains, the services that are provided are likely to be more diverse, more effective, and less expensive than those a single unit could purchase for itself on the open market. These benefits also include assurance of future access to greater resources than would otherwise be available, a factor of significant *current* economic value whether or not the unit actually uses the resources in a given year, or ever.

Thus, an individual who simply pays the direct costs of such collective-bargaining-related services as are rendered in a given year to a given unit, and does *not* otherwise contribute toward maintaining the union structure that provides services of enhanced quality and at a lower-than-market cost necessarily reaps the special economic benefits provided *without paying for those benefits.*[15] That being so, Michigan has determined, in its

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[15] A return to the HMO analogy may help to clarify this point: An HMO might choose to provide health services to members of the general public who are not regular subscribers. If so, however, the HMO would *not* simply charge nonsubscribers the directly traceable dollar costs of providing those services, likely to be "as much as one-fourth to one-third lower than traditional care in some parts of this country." S. Rep. No. 93-129 on the Health Maintenance Act of 1973, *supra*, 2.

Rather, the HMO would seek to set its price to reflect the quite different economic value of the discrete services provided if purchased on the open market on a fee-for-service basis. To do otherwise would be unfair to the regular subscribers, who would then be shouldering for an individual who chose not to participate in this group economic endeavor the costs of maintaining a system capable of producing low-cost high-quality services when needed.

Further, where that cost in a particular instance exceeded the flat fee paid annually by subscribers, the subscribers would not be expected to absorb that extra cost, but instead would pass it on to the nonsubscriber. And nonsubscribers would not have the

public employee collective bargaining statute, that objecting fee payers *cannot* in this fashion refuse to provide their full pro rata economic support to the system for providing collective-bargaining-related services actually chosen by the bargaining unit as a whole. *Bridgeport-Spaulding Community Schools*, 1986 Mich. Emp. Rel. Comm'n 1024; *Garden City School District*, 1978 Mich. Emp. Rel. Comm'n 1145; *Swartz Creek Community Schools*, 1971 Mich. Emp. Rel. Comm'n 645, 653.

2. The central premise of this Court's agency fee cases is that states may, *consistent with the Constitution*, "prevent 'free riders'—those who receive the benefit of union negotiation with their employers, but who do not choose to join the union and pay dues—from avoiding their fair share of the process from which they benefit." *Keller v. State Bar of California*, —— U.S. ——, 110 S. Ct. 2228, 2235 (1990). As Michigan has recognized, employees who reap the economic benefits of union representation on a multiunit/cost-sharing basis without sharing all the relevant costs *are* "avoiding their fair share of the process from which they benefit."

Moreover, because the Michigan statute limits the periodic fees of objecting nonmembers to the amount paid in dues and assessments by union members, objecting fee payers *cannot* be charged the full cost of such services as are actually supplied to their bargaining unit, where that cost in a given year is higher than the unit income realized from the pro rata fee. That being so, a unit-by-unit allocation of union expenditures would further frustrate the governmental interest in preventing free riding. For objecting fee payers could avoid paying even the union's immediate direct costs of providing collective-bargaining-related services to their unit in the

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assurance available to subscribers against very high health costs in a single year.

In short, a nonsubscriber could *not* claim the special economic values created by the prepaid funding system without contributing on a continuing basis to the support of the system.

years those costs *exceed* the unit income based on the dues charged to union members.

To be sure, in theory at least, Michigan *could* avoid this problem by permitting agency fees to fluctuate according to direct bargaining unit costs with no regard to the dues charged union members. But the judgment made in the Michigan statute (as well as in the NLRA, RLA, and all state labor relations statutes of which we are aware) is that placing a ceiling upon the fees paid by nonmembers at the level members charge themselves is the best assurance that collective bargaining costs are fairly allocated between members and nonmembers. To permit nonmembers to be charged *more* than members would lead to questions of equitable distribution potentially much more serious than those raised under the present scheme.

The judgment of every legislature that has looked at the question is entitled to respect in this regard, absent some clear Constitutional reason for favoring a system mandating entirely different schemes for members and nonmembers to pay for collective bargaining-related expenditures.[16]

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[16] Further, by insisting upon the right to have the union trace costs and calculate fees based upon an entirely different economic model than the one a majority of employees in the unit have chosen as the best one for their workplace, objecting fee payers would require of the union an administrative task that would be extremely costly to the extent it could be performed at all.

For example, to determine its expenditures in one bargaining unit, CWA would have to determine its own direct expenditures in each of the more than 700 units that union represents, and would have to allocate between units those expenditures benefitting less than all represented employees but more than one unit, such as joint bargaining, industry-specific economic research, and so on. In addition, CWA would have to calculate the expenditures for each unit made by each local representing unit employees; this task would by exceedingly complex, since many of the locals, like CWA itself, provide services to members of more than one unit, and for large units, many different locals provide representation. For a ration-

3. Thus, petitioners' argument comes down to the claim that the Constitution erects a mandatory preference for unit-by-unit funding of collective-bargaining-related services, so that objecting fee payers can *either* avoid paying their full share of the collective bargaining benefits made available to them *or* force the unit as a whole to forego its choice of a national union or its affiliate as the unit's representative in favor of a single unit bargaining representative. But just as "a Constitution is not intended to embody a particular economic theory" (*Lochner v. New York*, 198 U.S. 45, 75 (1904) (Holmes, J., dissenting)), so it is clear under this Court's cases that the First Amendment erects no preference for one "reasonable" and "normal" economic model for providing and funding collective-bargaining-related services, and for preserving labor peace by preventing "free-riding," over another.

(a) Petitioners' overall constitutional theory here is that First Amendment doctrine requires that *each and every* type of expenditure that a union seeks to charge to objecting fee payers be judicially scrutinized to determine whether that expenditure is *essential* to the representation of employees, rather than simply appropriate and useful toward that end. Pet. Br. 10-12. In other words, petitioners' argument is that a conscientious union that goes beyond the statutory minimum in fulfilling its representational responsibilties must allow objecting nonmembers to be "free riders," and to reap the benefits, without sharing in the burden, of such expenditures.

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wide unit in AT&T, this could require analyzing in detail the expenditures of hundreds of local unions.

Tasks of this kind could well prove so costly that complex multiunit unions would have to choose between foregoing collection of agency fees from dissenting fee payers entirely and using up much of the per capita savings achieved through a multiunit organization on the administrative costs of calculating those fees. In either case, the problem of "free-riding" would be greatly exacerbated.

This Court's recent First Amendment cases show as a general matter that legislation that serves a sufficiently strong overall governmental interest is not to be invalidated through strict judicial scrutiny of each *specific* application of the statute. *Board of Trustees v. Fox*, —— U.S. ——, 109 S.Ct. 3028, 3033 (1989) (least restrictive means standard does not apply, despite some interference with First Amendment interests, in testing the validity of time, place and manner restrictions, regulation of expressive conduct, or restrictions upon commercial speech.) *See also, e.g., Clark v. Community for Creative Non-Violence* 468 U.S. 288, 293, 299 (1984) (although "sleeping in connection with [a] demonstration is expressive conduct protected to some extent by the First Amendment," the Court nonetheless upheld a ban upon sleeping overnight in certain parks, because the Court "[did] not believe that [the First Amendment] assign[s] to the judiciary the authority to replace the Park Service as the manager of the nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained."); *Buckley v. Valeo*, 424 U.S. 1, 29, 30 (1976) (applying a "rigorous standard of review" the Court upheld a particular contribution limitation because "'[i]f it is satisfied that some limit on contributions is necessary, a court has no scalpel to probe whether, say, a $2,000 ceiling might not serve as well as $1,000'. . . . Such distinctions in degree become significant *only when they can be said to amount to differences in kind*'" (emphasis added)).

(b) As is only to be expected then, it is perfectly clear that the Constitution does *not* as a general matter straitjacket Congress or the state legislatures into requiring unions to adhere to one method of providing collective-bargaining-related services to employees as a condition for requiring objecting fee payers to provide pro rata financial support for those services:

> The very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of com-

pelled funds. "The furtherance of the common cause leaves some leeway for the leadership of the group." *Abood v. Detroit Board of Education, supra,* 431 U.S. at 221-222. . . . [*Ellis v. Railway Clerks, supra,* 466 U.S. at 456-57.][17]

Where the group has determined that collective-bargaining-related services are most effectively provided on a multiunit/cost-sharing basis rather than a unit-by-unit, fee-for-direct-services-rendered basis, that determination is one to "promote the cause which justified bringing the group together," and "the individual cannot withdraw his financial support merely because he disagrees with the group's strategy." *Abood v. Detroit Board of Education, supra,* 431 U.S. at 223.

Ellis, moreover, makes it clear that there is *no* constitutional basis for treating multiunit collective-bargaining-related expenses any differently from single-unit expenses:

> By allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree. . . . It has long been settled that such interference with First Amendment is justified by the governmental interest in industrial peace. . . . *At a minimum, the union may constitutionally "expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining."* . . . The issue is whether [any other] expenses involve additional interference with First Amendment interests of objecting employees, and, if so, whether they are nonetheless adequately supported by a governmental interest. [466 U.S. at 455-456 (emphasis supplied).]

As the italicized language in the above quotation indicates, there is *no* difference of constitutional significance

[17] In recognition of this flexibility, for example, the Court in *Ellis* refused to "fault" BRAC for "choosing to elect its officers at a convention rather than by referendum." 466 U.S. at 449.

between "uniform exactions . . . in support of activities germane to collective bargaining" calculated on multiunit/cost-sharing basis, and such exactions calculated on a unit-by-unit, fee-for-direct-services-rendered basis. In either case, the objecting fee payer's First Amendment interest in limiting payments stems from financing the bargaining activity in which the union is engaged. *See also Roberts v. United States Jaycees,* 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring).

Precisely because the multiunit/cost-sharing method for providing and funding collective-bargaining-related activities *does not vary the kinds of activities supported one whit,* "the fact that the employee is forced to contribute does not increase the infringement of . . . First Amendment rights already resulting from the compelled contribution to the union." *Ellis v. Railway Clerks, supra,* 446 U.S. at 456. An individual's First Amendment interest in refusing to "support financially an organization with whose principles and demands he may disagree" (*id.* at 455), does *not,* in other words, change *qualitatively* because of the way in which that organization chooses to calculate and allocate that financial support, as long as the *nature* of the activities supported remains the same.

3. Despite the foregoing, petitioners maintain that *Ellis compels* the conclusion that collective-bargaining-related activities can only be charged to nonmembers on a single unit, fee-for-direct-service-rendered basis. That contention is untenable, both on the basis of *Ellis'* basic rationale, just discussed, and for two additional reasons.

(a) First, the *Ellis* Court necessarily *rejected* the position petitioners suggest *Ellis* adopted. The central contention of the *Ellis* plaintiffs throughout that litigation was that as nonmembers, they constitutionally could "be compelled to contribute [to the exclusive representative] *no more than* their pro rata share of the expenses of negotiating agreements and settling grievances *with Western Airlines.*" 466 U.S. at 439 (emphasis supplied).

The *Ellis* district court, although upholding the contention that chargeable expenses are limited to those incurred in collective-bargaining-related activities, did *not* exempt the *Ellis* plaintiffs from contributing to the actual negotiation and contract administration expenses of units other than the ones at Western Airlines. *See Ellis v. Brotherhood of Railway, Airline & S.S. Clerks*, 685 F.2d 1065, 1075 (1982) (Whelan, J. dissenting) (quoting verbatim the district court's list of nonchargeable expenses). In this Court, the *Ellis* plaintiffs reiterated, both generally and with respect to the particular expenses the district court had held chargeable, their contention that objecting fees payers could be charged only the direct costs of bargaining in the unit in which the fee payers are employed.[18]

This Court, however, *rejected* the general principle that national unions must charge objecting fee payers on a fictional single-unit basis. Chargeable costs, the Court held, include "*not* only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but *also* the expenses of activities or undertakings *normally or reasonably* employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit." 466 U.S. at 448 (emphasis supplied); *see also id.* (emphasis supplied) (test is whether challenged expenditures are "necessarily *or* reasonably incurred.")

On this basis, the *Ellis* Court went on to approve as chargeable expenses social activities and conventions of the *national* union without regard to the connection of

[18] *See Ellis* Petitioners' Br. at 22 (only those convention expenditures "directly related in fact to representation of the Western Airlines bargaining unit [are] chargeable to plaintiffs"); *id.* at 24 (social expenses should not be chargeable unless "attended by the employer"); *id.* at 27 (contending that because "BRAC did not prove its costs of collective bargaining with Western Airlines" and "has [not] maintained accounting records to isolate the costs of collective bargaining with Western Airlines", the union did not meet its burden of proof).

such expenses to a particular bargaining unit, as well as publications that communicate "collective bargaining, contract administration, and employees' rights to *employees represented by BRAC*," and not only those at Western Airlines. 446 U.S. at 450 (emphasis added). Moreover, the Court necessarily rejected as well the *Ellis* plaintiffs' insistence that the union had not met its burden of proof with regard to those expenses that specifically concern negotiations and grievance adjustment, albeit not directly to Western Airlines bargaining. *Cf.* 466 U.S. at 457 n.15.[19]

(b) Second, reading *Ellis* as petitioners do would put *Ellis* at odds with this Court's pre-*Ellis* discussions of the proper remedial accommodation between the interests of the majority and those of objectors.

From the outset, this Court's opinions have stressed that in allocating bargaining-related costs to dissenting feepayers, any economically sensible approach is allowable. Thus, *Railway Employes' Dept. v. Hanson, supra*, 351 U.S. at 238, stated that, so long as "[t]he financial support required relates . . . to the work of the union

[19] The *Ellis* Court did hold two categories of expenses—for "general litigation and organizing efforts"—not chargeable to objecting fee payers. 466 U.S. at 41. While the *Ellis* Court did not explain in constitutional terms why some litigation and all organizing expenses were treated differently than other expenses for purposes of the *Ellis* plaintiffs' unit-by-unit argument, we surmize that the reason is this:

Both litigation "not involving the negotiation of agreements or settlements of grievances" (466 U.S. at 440)—which we take to be short hand for litigation that is not collective-bargaining-related—and organizing implicate heightened First Amendment interests, separate from those involved in requiring support of union activity germane to collective bargaining generally. *See In re Primus*, 436 U.S. 412 (1978); *Ellis v. Railway Clerks, supra*, 466 U.S. at 452 & n.13 (organizing involves proselytizing on behalf of the union, not engaging in representation of employees for bargaining purposes); *id.* at 456 (where "the communicative content is . . . inherent in the act," union expenditures with some relationship to collective bargaining may be held to a stricter First Amendment standard than where the objection is simply that it is a *union* expense).

in the realm of collective bargaining[,] [n]o more precise allocation of union overhead to individual members [than charging uniform dues] seems to us to be necessary." *Machinists v. Street*, 367 U.S. 740 (1961), after holding that a union could not expend fees received from an objecting employee on politics, suggested as a remedy for such expenditures a refund of a portion of the objector's payments "in the same proportion that the expenditures for political purposes . . . bore to the total union budget" (*id.* at 775), and specifically stated there was no requirement "to trace [the objector's] money up to and including its expenditure," (*id.*). *Railway Clerks v. Allen*, 373 U.S. 113 (1963), reiterated the remedy suggested in *Street*, noting that to carry out this remedy "two determinations will have to be made: (1) what expenditures disclosed by the record are political; (2) what percentage of *total* union expenditures are political expenditures. . . ." *Id.* at 121 (emphasis supplied). The *Allen* Court emphasized that "[a]bsolute precision in the calculation of such proportion is not, of course, to be expected or required. . . ." *Id. See also Abood v. Detroit Board of Education, supra*, 431 U.S. at 237-242 (following the foregoing precedents).

Petitioners' unit-by-unit accounting requirement cannot be squared with any of these statements by the Court concerning the appropriate remedy in agency fee cases. By petitioners' lights, even a union that spent *all* of its funds on collective bargaining would have to make a "precise allocation of union overhead to individual members" (*Railway Employes' Dept. v. Hanson, supra*, 351 U.S. at 238) on a unit-by-unit basis. And, under petitioner's theory, the proper remedy for the use of an objector's payments for nonchargeable expenditures could not be the one spelled out in *Street* and *Allen*, since the "practical decree" suggested there does *not* require a further, unit-by-unit breakdown of the union's total expenditures.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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